FILE COPY.

Supreme Court U. S.
FILED
APR 1 1905
JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 229.

HENRY VAN REED,
Plaintiff in Error,

v.

THE PEOPLES NATIONAL BANK OF LEBANON, PENNSYLVANIA.

In Error to the Court of Appeals of the State of New York.

BRIEF FOR PLAINTIFF IN ERROR

JAMES W. M. NEWLIN,
For Plaintiff in Error.

Intelligencer, 229 Chestnut St.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1904.

HENRY VAN REED, PLAINTIFF IN ERROR,
v.
THE PEOPLES' NATIONAL BANK OF LEBANON, PENNSYLVANIA. } No. 229.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an appeal from an order of the Court of Appeals of the State of New York vacating an attachment (p. 21).

Plaintiff is the assignee of a claim against the defendant for professional services as attorney (2 to 4). Plaintiff's assignor resides in Philadelphia, Pa. (3). Defendant is a national bank, located at Lebanon, Pa. (2).

Plaintiff, a resident of New York, commenced his action there by levying an attachment against funds of the defendant in that State, the ground of the attachment being that the defendant is a foreign corporation (1-2).

Defendant appeared specially, and moved to vacate the attachment as prohibited by the United States Revised Statutes (4). The Special Term denied the motion (6). The Appellate Division reversed the Special Term, and vacated the attachment (8). Two judges dissented (13).

The Appellate Division allowed an appeal to the Court of Appeals (7) certifying two questions, viz.: (8).

1. Is the defendant exempt from attachment before judgment under Section 5242, U. S. Revised Statutes?

2. Are the rights claimed by plaintiff, to attachment againt the defendant before judgment, and to the jurisdiction thereby acquired, preserved and given by Section 4 of the Act of Congress of July 12, 1882?

The Court of Appeals of New York affirmed the Appellate Division (21) and the judgment was removed to this Court by writ of error (26) upon assignments covering the above mentioned questions (25).

ASSIGNMENT OF ERRORS.

Now, March 2, 1904, comes the above plaintiff and files herewith his petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

I. In ordering that the order of the appellate division of the Supreme Court of the State of New

York, granting the motion to vacate the attachment, be affirmed:

II. In answering the first question: "Is the defendant exempt from attachment before judgment under Section 5242 of the United States Revised Statutes?" in the affirmative:

III. In answering the second question: "Are the rights claimed by the plaintiff to attachment against the defendant before judgment and to the jurisdiction thereby acquired, preserved and given by section 4 of the Act of Congress of July 12, 1882," in the negative.

For which errors the plaintiff, Henry Van Reed, prays that the order of judgment of the Court of Appeals of the State of New York, dated January 20, 1903, be reversed, and a judgment entered for the plaintiff, Henry Van Reed, and for costs.

THE ARGUMENT.

The point involved is whether the property of a non-resident solvent National Bank can be attached before judgment as a means of acquiring jurisdiction of the defendant for the purpose of determining whether it is liable on the demand made by the plaintiff in the attachment.

The following Statutory Provisions are to be considered.

R. S. Section 5242.

Federal Statutes Annotated, Vol. V. p. 188.

Compiled Statutes, 1901, p. 3517.

"Sec. 5242.

Transfers, when void.

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action or proceeding in any State, County or Municipal Court."

Act June 3, 1864, c. 106, sec. 52, 13 Stat., 115."

Act of July 12, 1882, c 290, Section 4, 22 Stat., 163.

Federal Statutes Annotated Vol V., p. 91 & 194.
Compiled Statutes, 1901, p. 3458.

"Corporate powers upon extension of period of succession; jurisdiction of suits by or against national banks.

"Sec. 4. That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted and shall continue to be subject to all the duties, liabilities and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: Provided, however, That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking association may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be and the same are hereby repealed."

Act March 3, 1887, c. 373, sec. 4, 24 Stat, 554, revised by Act Aug. 13, 1888, c. 866, sec. 4, 25 Stat., 436."

Federal Statutes Annotated, Vol. V., p. 193-4.
Compiled Statutes, 1901, p. 514.

"Jurisdiction of suits by or against national banks,

as in cases between individual citizens of same State."

"Sec. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district court shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

Section 5242, Revised Statutes, as construed in the State Courts was held to apply only to cases of insolvent banks. Then came the decision of the Supreme Court of the United States in the case of Pacific National Bank *v.* Mixter, 124 U. S. p. 721, which does in terms state that under Section 5242 an attachment against a National Bank before judgment was void, whether the Bank was solvent or insolvent.

The Act of July 12, 1882, was passed *after* the Mixter proceedings were begun in the State Court, and hence the meaning of that Statute was not before this Court in the Mixter case.

Since its decision, the State Courts have assumed that the decision in the Mixter case as applied to solvent banks was not *obiter* and in the case at bar it was held in the State Court on the authority of the Mixter case that the Act of July 12, 1882,

did not make the attachment before judgment valid.

Points Submitted by Plaintiff in Error.

It is submitted that a review of the cases will show as follows :

(*a*) *What is said in the opinion of this Court in the Mixter case that all attachments before judgment against National Banks solvent or insolvent are void under Section 5242, is not only obiter but contradicts the judgment of the Court in the Mixter case, which upheld the jurisdiction of the Court below, acquired against the non-resident National Bank by reason of the attachments and sustained the judgments entered below in virtue of this jurisdiction, but restrained what was practically execution viz. proceedings on the bond to dissolve the attachment the bank being itself insolvent.*

(*b*) *Aside from this consideration subsequent statutes give jurisdiction to the State Court by attachment against non-resident National Banks before judgment, at least to the extent of bringing the defendant into Court and authorizing the rendition of judgment irrespective of what may follow.*

Pacific National Bank v. Mixter. 124 U. S. page 721, (1888).

The attachment proceedings in this case were in the Circuit Court of the United States for the District of Massachusetts, and were begun March 24, 1881. On November 20, 1881, the bank was placed in the hands of a receiver.

The bank gave bond to release the attachment. On March 18, 1882, the bank reopened with the consent of the Comptroller of Currency.

On May 22d, 1882, the bank having closed its doors for the second time, a receiver was appointed in accordance with the provisions of Section 5234, of the Revised Statutes.

The receiver then moved to discharge the attachments and to dismiss the suits. The Circuit Court refused the motion and gave judgments against the bank in each of the cases.

Failing in his motions and in his defences at law, the receiver filed a bill in equity in the Circuit Court against the several attaching creditors, and the sureties on the bonds given to dissolve the attachments so as to reduce to his possession the securities which were held by the sureties for their protection against liability, and to restrain the several attaching creditors from enforcing the attachment bonds on the ground among others "that the attachments made in said action were illegal and void."

The bill in equity was dismissed by the Circuit Court, 22 Federal Reporter, 694, and from that decree the appeal was taken to the Supreme Court of the United States.

The judgment (page 730), was "The judgments in each of the suits at law is affirmed, but the decree in the suit in equity is reversed and the cause remanded with instructions to enter a decree setting aside and annulling the bonds which were given to dissolve the attachment, and enjoining each and all of the creditors, and those claiming under them, from proceeding in any manner to enforce the same against the sureties, and directing the sureties to surrender to the receiver the securities they hold for their indemnity."

It is important to consider these details with great care because the action of the Court amounts to this.

That the attachments themselves before the declared insolvency of the bank, though declared void nevertheless, were valid for the purpose of acquiring jurisdiction of the person of the bank, and that the judgments entered in favor of the creditors were valid judgments, but could not be enforced through the bond given to dissolve the attachment.

Having reached this point, the Court found itself in this position that the jurisdiction obtained through the attachments themselves must be sustained and the action of the Circuit Court in sustaining them at least as ground for jurisdiction must be affirmed.

Going a step further, however, this separate question arose, what must be done with the assets of the bank, which had been deposited with the surety to protect it against the bonds given to dissolve the attachments, the bank now being in the hands of a receiver?

Now the distinction is quite apparent, and it is radical.

This Court by necessary implication said these attachments are not wholly void, they are good for the purpose of giving jurisdiction, *i. e.*, for bringing the attached bank into Court and enabling the Court to give judgment against it. But after the attachment was granted and after the assets of the bank were put up as security for the dissolution bond, the insolvency of the bank became known and open. The case was then presented of the receiver claiming these are assets of an insolvent bank in the hands not of the creditors who issued the attachment, but in the hands of a third party, and the Court was

asked to restrain the creditors from proceeding on the dissolution bond. This Court went that far and then stopped in its judgment.

The only question which arises in the case at bar of Van Reed plaintiff in error against the Lebanon National Bank, defendant in error, is the very point decided by this Court in the Mixter case, (irrespective of the Act of July 12, 1882, subsequently passed), viz., was the attachment itself void as a means of giving jurisdiction to the Circuit Court *to determine whether the Bank owed the attaching creditor any money.* This Court in the Mixter case necessarily upheld the attachment as a means of giving jurisdiction to the Circuit Court, to the extent of giving judgment against the bank and only stayed the creditors in proceeding on judgments which were affirmed when it became evident that the assets of the *then* insolvent Bank were being taken to satisfy those valid judgments.

In other words the only point that is before the Court in the case at bar is, was Van Reed's attach ment valid, to the extent of giving jurisdiction by bringing the Bank into Court, and this was the identical proposition that was decided by this Court in the Mixter case in favor of the attachment. This statement of facts shows most conclusively that the following remark of the Chief Justice in the Mixter case is *obiter.*

Page 727: "In our opinion the effect of the act of Congress is to deny the State remedy altogether so far as suits against National Banks are concerned, and in this way it operates as well on the Courts of the United States, as on those of the States. Although the provision was evidently made to secure

equality among the general creditors in the division of the proceeds of the property of an insolvent bank, *its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.*"

If this language was meant to announce that the Court below could not acquire jurisdiction by attachment to determine what the Bank owed to the plaintiff, it failed to so state. Had it so stated in so many words the language would contradict the formal judgment of the Court sustaining the judgments in the Court below obtained by these very attachments, bringing the non-resident National Bank into Court which this Court was in this very opinion sustaining by their judgment thereon as having been the valid basis for the entry of judgments against the Bank in the Court below.

It is submitted, therefore, that it is quite clear that the judgment of this Court in the Mixter case, amounts simply to this, that where there is a valid judgment in an attachment proceeding against a National Bank, which attachment was issued before judgment, the judgment is good, but it may not thereafter be used in a suit on the dissolution bond, where subsequently to the Court below acquiring jurisdiction by attachment and giving judgment, the bank has passed into the hands of a receiver.

Hence, it follows, as a last analysis that the only point actually authoritatively determined by the Supreme Court, was that in the particular case, although the judgments in the attachment proceedings were valid, the judgment creditor—*now that the bank was in the hands of a Receiver*—must

come in under Receivership proceedings to acquire its share of the funds of the insolvent bank. The *amount* of the claim was held to be validly determined by judgment in the Court below which only acquired jurisdiction of the person of the non-resident National Bank by the attachment.

Now in the case at bar, the Bank is solvent and under this very Mixter case, Van Reed was entitled to go on and get judgment. Whether he could go further is not before this Court.

If, however, it was the intention of this Court in the Mixter case to really broadly declare that in the case of a solvent bank section 5242 R. S. made it impossible for a court to acquire jurisdiction by attachment, it was clearly at variance with the judgment entered and the whole history of the case as reported shows this to be the fact.

Bank *v.* Mixter, U. S. Reports, 124, page 730 says:

> "*This will not affect the judgments* that the creditors have recovered, *any further than to limit their operation*, so far as the receiver and the sureties on the attachment bonds are concerned, *to the* adjudication of the debts as *claims entitled to dividends from the proceeds of the assets of the bank. To that extent, certainly, the Court had jurisdiction in each of the suits after the insolvency;* but as the attachments were void the judgments are inoperative *as a basis of recovery upon the bonds.*"

Prior to the decision of the Mixter case, various State courts had determined that R. S. Section 5242 only applied to cases of insolvent National Banks. Since the decision of that case, the State Courts have treated the decision in the Mixter case as binding, even

in the case of solvent National Banks not noticing that the Mixter case to this extent was *obiter*, and even if not *obiter* in addition thereto not observing that this court on the Mixter case upheld the jurisdiction of the Court below, acquired by reason of the attachments and sustained the judgments, which could not, it is submitted be predicated upon the idea that appearing and giving bond to set aside the attachments could be considered as a voluntary appearance in a personal action.

Of course, this court could not in the Mixter case determine anything as to the effect of the Act of July 12, 1882, and the subsequent re-enactments thereof, as the attachments had been previously issued and could derive no force from these subsequent statutory provisions. This point has not been noticed in the subsequent State cases other than that at bar in error.

It is submitted that the question of jurisdiction under these subsequent acts of Congress is an open one for this court.

It is further submitted that the Mixter case itself has been questioned by this court, viz., in Earle *v.* Pennsylvania, 178 U. S., page 449 (1900). It is true that in that case the insolvent National Bank was attached merely as a garnishee.

Justice HARLAN in that case, p. 453, after saying that Section 5242 is to be construed in connection with the prior sections relating to insolvent banks, (page 454), says: "*Whatever may be the scope of Section 5242* an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within

the meaning of that section." This is precisely the reasoning of the case of Robinson *v.* Bank, 81 N. Y., 385 and Raynor *v.* Bank, 93 N. Y., 37, holding an attachment good against a solvent National Bank, and bad against an insolvent one.

Earle *v.* Conway, 178 U. S., page 456, Syl. (1900).

> "A receiver of a national bank may be notified, by service upon him of an attachment issued from a state court, of the nature and extent of the interest sought to be acquired by the plaintiff in the attachment in the assets in his custody; but for reasons stated in Earle *v.* Pennsylvania, *ante* 449, such an attachment *cannot create any lien upon specific assets of the bank in the hands of the receiver* * * * "

Joy *v.* St. Louis, 122 Fed. Rep. 525 (1903).

TRIEBER, Dist. *J.* "It is the settled law that the act of March 3, 1887, as corrected by the act of August 13, 1888, 25 Stat., 433 (U. S. Comp. St. 1901, page 507) was intended by Congress to contract the jurisdiction of the National courts, and that all doubts must be resolved against jurisdiction." In this case the Act of July 12, 1882, is not referred to.

Petri *v.* Commercial Bank, 142 U. S., page 649.

FULLER, *C. J.*, referring to the proviso of the fourth section of the Act of Congress of July 12, 1882, c. 290, says:

> "So far as the mere source of its incorporation rendered suits to which a national bank might be a party, cognizable by the Circuit Courts, that was taken away, but the jurisdiction which those courts might exercise in such suits when arising between citizens of different states

or under the constitution or laws of the United States, except in that respect, remained unchanged."

United States *v.* American Bell Telephone Co., 159 U. S., page 548., Syl. 2.

"Where the appellate jurisdiction of this court is described in a statute in general terms so as to comprehend the particular case, no presumption can be indulged of an intention to oust or to restrict such jurisdiction; and any subsequent statute claimed to have that effect must be be examined in the light of the objects of the enactment, the purposes it is to serve and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."

Ex parte JONES, 164 U. S., page 693.

Brown, *J.*, after referring to the Acts of July 12, 1882, March 3, 1887, and August 13, 1888, Section 4, for the Court continues:

"In Leather Mfrs. Bank *v.* Cooper, 120 U. S., 778, it was held by this Court that, under the act of 1882, *which was similar in its terms*, an action against a national bank could not be removed to the Federal Court 'unless a similar suit could be entertained by the same court by or againt a state bank in like situation with the national bank. Consequently so long as the act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a national bank *because of the source of its incorporation*.'"

Garner *v.* Second National Bank 66 Fed. Rep. page 371 (1895).

LACOMBE, Circ. J. "The statutes of the United States expressly prohibit the issuing of an attachment against a national bank or its property before final judgment in any suit, action, or proceeding in any State court." Rev. St. U. S. sec. 5242; Bank *v.* Mixter, 124 U. S. 721."

This case makes no reference to the acts of July 12, 1882, and August 13, 1888.

Hower *v.* Weiss, 55 Fed., page 356 (1893) Syl. 3.

> "Rev. St. U. S., Sec. 5242, providing that no injunctions shall issue from a State court against a national bank before final judgment, does not deprive the Federal Circuit Court of power to issue such an injunction, or to continue, after removal of the case, an injunction previously granted by a State court. Bank *v.* Mixter, 8 Sup. Ct., Rep. 718, 124 U. S. 721, distinguished."

The injunction was sustained on the ground of inherent equity power in the United States Courts.

Continental National Bank *v.* Buford, 191 U. S., p. 119.

The Court, HARLAN, J., p. 123, construes the Act of July 12, 1882, March 3, 1887 and August 13, 1888 Section 4, and says, the necessary effect of this legislation was to make the national banks citizens of the states and to withdraw the jurisdiction of the Circuit Court when invoked, "simply upon the ground that they were created by and exercised their powers under acts of Congress. No other purpose can be imputed to Congress than to effect that result."

Norris *v.* Merchants' National Bank, 30 Ill., App. p. 54.

GRAY, *J.*, p. 55, citing Butler *v.* Coleman (*sic.*), —meaning Bank *v.* Mixter—124 U. S., 721, says:

> "It is undoubtedly true that before the "Act of July 12, 1882, amending the National "Banking Law, the effect of the voluminous "legislation by Congress in relation to national "banks, did prohibit the issuance of attach- "ments out of State Court against them. But- "ler *v.* Coleman (*sic.*), 124 U. S., 721."

(Undoubtedly this means Bank *v.* Mixter.)

> "Whether that Act which provides that "the jurisdiction for suits against them shall "be the same as, and not other than the juris- "diction for suits against banks not organized "under any law of the United States, removes "that prohibition, is a debatable question. It "is not necessary to consider it in this case, for "if the prohibition continues, it is a personal "privilege of the defendants, which they may "waive (Kenney *v.* Greer, 13 Ill., 432), as they "have done."

Holmes *v.* National Bank of Wilmington, 18 S. Car., p. 37.

The Court, August 1, 1882, sustained an attachment against a National Bank before judgment (issued in 1881) on the ground that R. S. 5242, was intended "to prevent discrimination between cred- "itors in cases of insolvency or bankruptcy."

The Act of July 12, 1882.

This introduces a new and unanswerable authority for the proposition that whatever may have been the former law, attachments against National Banks, before judgment, *when constitut-*

ing the basis of jurisdiction, are now to be sustained. Had the defendant in the case at bar, been a foreign State bank, with funds here, the New York Courts would clearly have had jurisdiction through attachment, to impound the funds. Hence under the Act of 1882, the same jurisdiction exists over the funds of a foreign national bank.

There is no answer to this argument. Unless it be so held, then it is not true that the jurisdiction for suits against National Banks is the same as for suits against State Banks, and the plain language of the statute is violated.

If the prohibition of Section 5242 be construed to include solvent banks, then the Act of July 12, 1882 conflicts, and being the later statute, must prevail.

The trend of legislation is distinctly toward removing from national banks any class privilege, or legel advantage of any description whatever.

Thus the Act of Congress of March 3, 1873, prohibited any attachment or injunction before judgment against any national bank (Mixter Case, 124 U. S., pp. 724, 725).

This was repealed, in its original independent position, but re-enacted in Section 5242 as a part of the provisions relating to insolvent banks, the plain inference being, as held in the Robinson case, that thereafter it concerned only insolvent banks.

Then comes the Act of July 12, 1882, which states broadly that National Banks shall be subject to the same jurisdiction as other banks similarly located, and repealing all inconsistent provisions, and finally comes the Act of March 3, 1887, as re-enacted August 13, 1888, providing that National Banks shall be deemed citizens of the States in which they

are located, for purposes of jurisdiction, under which it has been held that a Chicago National Bank can sue in Texas.

Petri *v.* Commercial National Bank, 142 U. S. 644.

If a Chicago bank can sue in Texas, why in all fairness should it not be suable there, if jurisdiction can be obtained? Surely only the most express statutory enactment (and none such exists) can justify a decision to the contrary.

So long as Section 5242 is limited in its application to insolvent banks, it rests upon a broad principle of justice, the conservation of assets for the equal benefit of creditors, which every one can approve.

If the Court goes beyond that, however, and notwithstanding the Act of July 12, 1882, it makes National Banks a privileged class, which is contrary to all standards, political or moral, of our country, and clearly against the policy of the law as laid down by Congress. Such a construction should be adopted only when unavoidable, which is not the case here.

In conclusion, we respectfully summarize the reasons which justify and require the reversal of the judgment below irrespective of the Act of Jnly 12, 1882.

1. All there is against it, is the Mixter case, a dictum, pure and simple.

2. The U. S. Supreme Court has itself questioned, and therefore nullified, the dictum, in the later case of Earle *v.* Pennsylvania (178 U. S. 449).

3. The dictum, on its face, violates elementary rules of construction.

The opinion of Chief Justice WAITE, after stating that from its incorporation among provisions for insolvent banks, the prohibition against attachment was evidently "intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank," then goes on to say, that however that may be, as it was once an independent provision, the form of its re-enactment "does not change its meaning in this particular."

We think the fact that it was once an independent provision, was repealed as such, and subsequently re-enacted as a subsidiary clause in a section relating to insolvent banks, is evidence that it was thereafter intended to apply simply to insolvent banks.

4. Aside from the foregoing, the Act of July 12, 1882, is independent authority sustaining jurisdiction by attachment because it exists as to State Banks. This Act has not been construed by the U. S. Supreme Court, on the basis of accepting the Mixter dictum as law.

5. Modern public policy and the trend of modern legislation, are against making National Banks a privileged class, except so far as necessary to secure equal distribution of assets in the case of insolvency.

Jurisdiction of the State Court under the Act of July 12, 1882.

The proviso in this Act is as follows:

The words in italics would have to be written in by the Court in order to make it read as it has been construed by the New York Courts below:

"Provided, however, That the jurisdiction [*as to forum but not as to procedure*], for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction."

There is no ambiguity about these words. They have a perfectly plain meaning, and it is not a province of the Courts to make them mean anything else by judicial legislation, which is a vice of the decisions in the Court below.

There is not a word in the statute about "forum" or about "procedure." There is not a single word from which it can be even surmised that Congress had any such notion in its mind and it had not.

The object of the act is perfectly clear. It was a disabling act as to National banks, and to put National banks and State banks in exactly the same category as to jurisdiction, subject, of course, without stating it in words, to the right of a National bank of another State on account of the diversity of citizenship to have recourse to the Federal Courts.

This right they already had, and it was, therefore, not necessary to give it to them, and if the object of Congress was simply to deny jurisdiction on the mere ground of incorporation under a Federal statute, it could have said so, but Congress did not say so because its object was broader than this. It not only meant in the Act of 1882 and the subsequent statutes of 1887 and 1888, to prohibit National banks going into the Federal Courts where there was no diversity of citizenship, but it meant more to put National banks and State banks on the same level

in the State and Federal courts as to all questions of jurisdiction.

It is absurd on its face where jurisdiction is given by the use of that expressive technical term to interpolate into the statute a distinction between "forum" and "procedure," and not contained in the statute. Congress has not said that the "forum" shall be one thing and the "procedure" another, or that the forum is changed and the procedure is not changed. This whole thing is a figment of the imagination. If the words were ambiguous—which is not the case—the well settled canon of construction must prevail. The Court must consider, viz:

The old law

The mischief

The remedy.

Now what was the mischief? The doubt afterwards resolved by this Court into a certainty (if Mixter *v.* the Bank is not *obiter* as to solvent banks) that attachments and injunctions could not under the old law R. S. 5242 issue before judgment against a National Bank.

The mischief.

What was the mischief? It is a matter of common knowledge of which the Court will take cognizance, that there was and is a prejudice against National Banks being treated in any other or different way than State Banks are treated, and it has been the policy of the Federal law to avoid discrimination against State banks except in the one essential feature of preventing them issuing notes. Hence we know what the old law was or was supposed to be, and finally what it came to be, and we know wherein it was considered a mischief, and this

brings us to the remedy which is not given in the Act of July 12, 1882, unless free scope is given to its language by holding that in the case of a solvent National Bank the jurisdiction of the State Court, as to attachments before judgment is the same as in the case of a solvent State Bank.

Now as to a solvent State Bank, it is not disputed anywhere in the United States, that where non-resident, jurisdiction of such bank may be acquired by attaching its property before judgment, and clearly the Act of 1882, meant to put National Banks in the same category for all purposes whatever.

Of course, where a National Bank becomes insolvent, then other Federal statutes step in and halt the entire proceeding in the State Court, except as to ascertaining the amount due by the bank to its creditor.

The Act of insolvency and receivership by force of the Federal statute makes it impossible for the State Court to proceed further, and the creditor is in this position that having begun an action against a National Bank by attachment in a State Court, as against a non-resident corporation, the State Court can ascertain the amount of its debt and then under such attachment—the jurisdiction having been acquired by attachment—the creditor can claim relief through the receivership like any other judgment creditor or any creditor, who proves his claim through the receivership.

This is all that the plaintiff in error asks here, that the jurisdiction of the New York Court be confirmed to the extent of conferring jurisdiction to hear and determine the cause, to wit, whether the

Bank is indebted to Van Reed assignee and for what sum. Beyond that this Court need not go in this cause.

DEFINITION OF JURISDICTION.

American and English Encyclopedia of Law, Second Edition, Vol. 17, p. 1041-2.

"I. Definition.—Of the various definitions of jurisdiction perhaps the most satisfactory is as follows: Jurisdiction is authority to hear and determine a cause. Since jurisdiction is the power to hear and determine. it does not, as will be pointed out later, depend either upon the regularity of the exercise of that power or upon the rightfulness of the decisions made."

"II. Jurisdiction and Exercise of Jurisdiction Distinguished.—Jurisdiction should therefore be distinguished from the exercise of jurisdiction. The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction. When there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but the exercise of that jurisdiction."

"Note 1. 17 A. & E. E. L. p. 1041. Definitions of Jurisdiction.—There is perhaps no word in English law that has been more frequently defined that this of "jurisdiction." From the earliest times we find the question of its proper definition engaging the attention of jurists. Thus we find the following: "And jurisdiction is nothing else than to have the authority of judging, that is, of pronouncing judgment, between parties in actions, against persons or things according as they have been brought

into judgment by an authority either ordinary or delegated, concerning which we have spoken above concerning the powers of those who judge." Bracton De Legibus Angliæ (Master of Rolls, ed. 1883), vol 6, p. 159, or lib. 5 Tract. 5, fol. 400 V. "*Jurisdictio est potestas de publico introducta cum necessitate jurisdicendi*," 1 Bulst. 210. The case of Marshalsea, 10 Coke 73 a; or, as translated by Mr. Burrill: "Jurisdiction is a power introduced of common right (by public authority or for the common benefit,) arising out of the necessity of declaring the law."

"The right by which judges exercise their power." Hale's Anal. Sec. 11. "The power of hearing and determining causes, and of doing justice, in matters of complaint." Halifax Anal. v. 3, c. 8, num. 4.

"Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case." Reynolds *v.* Stockton, 140 U. S., 268; St. Louis, etc., R. Co. *v.* State, 55 Ark., 205; Falls *v.* Wright, 55 Ark., 565; Munday *v.* Vail. 34 N. J. L., 418.

Jurisdiction is defined to be the authority or power which a man hath to do justice in causes of complaint brought before him. Tomlins L. Dict.; Bucky *v.* Willard, 16 Fla. 332.

Note 2. 17 A. & E. E. L., p. 1041. Approved Definition.—United States, Daniels *v.* Tearney, 102 U. S., 418; Applegate *v.* Lexington, etc. Min. Co., 117 U. S., 267; Simmons *v.* Saul, 138 U. S., 454; Holmes *v.* Oregon, etc., R. Co., 5. Fed. Rep., 534, 9 Fed. Rep., 232, 6 Sawy. (U. S.) 285; 7 Sawy. (U. S.) 385; Grignon *v.* Astor, 2 How. (U. S.) 338; U. S. *v.* Arredondo, 6 Pet. (U. S.) 691; Decatur *v.* Paulding 14 Pet. (U. S.) 599; *in re* Bogart, 2 Sawy. (U. S.) 401, 3. Fed. Cas. No. 1,596; Le Roy *v.*

Clayton, 2 Sawy. (U. S.) 499, 15 Fed. Cas. No. 8,268; Riggs *v.* Johnson County, 6 Wall. (U. S.) 187; McNitt *v.* Turner, 16 Wall. (U. S.) 366; Cornett *v.* Williams, 20 Wall. (U. S.) 249.

Bank *v.* Mixter 124, U. S., p. 727-8, says: "While the law as it stood previous to the act of July 12, 1882, 22 Stat. 163, c. 290, sec. 4, gave the proper state and federal courts concurrent jurisdiction in all ordinary suits against national banks, it was careful to provide that the jurisdiction of the federal courts should be exclusive when relief by attachment or injunction before judgment was sought. Until the act of 1882 the federal courts had ample authority to grant injunctions in proper cases, and all a person need do to invoke that authority was to bring his suit in one of those courts. Whether since the act of 1882 this remains so is a question for the consideration of Congress. Some amendment to existing legislation may be necessary, but this does not shed any light on the interpretation of the old law. The difficulty arises from the change that has been made, not from the law as it stood originally."

It is not clear what this quotation means, particularly in its use of the words

> "Whether since the Act of 1882 this remains so is a question for the consideration of Congress. Some amendment to existing legislation may be necessary * * * "

What this Court said in Petri *v.* Commercial National Bank, 142 U. S. p. 649, is as follows:

"So far as the mere source of its incorporation rendered suits to which a national bank might be a party, cognizable by the Circuit Courts, that was

taken away, but the jurisdiction which those courts might exercise in such suits when arising between citizens of different States or under the Constitution or laws of the United States, except in that respect, remained unchanged."

What is said there must be taken to be no broader than what the case called for, and the case did not call for the Court deciding whether under the Act of July 12, 1882, an attachment before judgment might be issued against a solvent National Bank. The point actually decided was merely that there was no privilege of National Banks that was not shared in by all other litigants, who could invoke Federal jurisdiction by reason of diversity citizenship.

If this Court meant to go further and meant to decide that under the Act of July 12, 1882, an attachment would not lie against a National bank—as it would against a State bank—before judgment, it would have been very easy for the Court to say so.

Even then had it said so it would have *obiter dictum* because the question was not before the Court.

It is submitted that this does not decide that the jurisdiction in the Act of July 12, 1882, would not allow an attachment in a State Court against a solvent National Bank before judgment when used as a means of acquiring jurisdiction. If it had been intended for such purpose it would also have been *obiter* for the plain reason that the question was not before the Court at all. No attachment had been issued before judgment, and the syllabus clearly indicates that the point under consideration is:

All that was before the Court was what is stated in a few lines in the Syllabus, 142 U. S. p. 644.

> "A national bank, located in one State, may bring suit against a citizen of another State, in the Circuit Court of the United States for the District wherein the defendant resides, by reason alone of diverse citizenship."

The question is therefore clearly before this Court now in the case at bar, and must be determined by considering what was the meaning of the word "jurisdiction" in that Act, and what was the meaning of the repeal of the conflicting legislation.

In the Court below, Appellate Division, it was attempted to restrict the meaning of the word "jurisdiction", so as to prescribe the *forum* and not regulate the *procedure* (page 12). Petri *v.* Com. National Bank, 142 U. S., 644, is cited as authority for this proposition. From this judgment VAN BRUNT, *P. J.*, and O'Brien dissented (page 13).

The Court of Appeals of New York took the same view (page 23 and 24) and cited also Bank *v.* Mixter 142 U. S. 727, in support of the proposition that the Act of July 12, 1882, "did not repeal the prohibition by which the remedy of attachment is taken away altogether so that it cannot 'be used under any circumstances.'"

But this remark in Bank *v.* Mixter did not refer to the Act of July 12, 1882 at all. The Court was then speaking of R. S., Sec. 5242.

It is submitted that this question has not been decided by the Supreme Court of the United States, and is open for consideration now.

So far as Bank *v.* Mixter is concerned, as the attachments were issued before the passage of the Act of July 12, 1882, what is said by this Court in the Mixter case is clearly *obiter*.

Moreover what this Court therein said in regard to the Act of July 12, 1882, is quoted at length on page 26 of this brief.

It says nothing of any distinction in the grant of jurisdiction between "forum" and "procedure" and it is confidently submitted that under the Act of July 12, 1882, the Court below should be reversed and the jurisdiction of the State Court should be affirmed "to hear and determine" whether the People's National Bank of Lebanon, Pennsylvania, is indebted to Henry Van Reed, the plaintiff in error.

JAMES W. M. NEWLIN,
For Plaintiff in Error.